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Sup. Brf. of Putnam & Burlingham for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898

The Mayor, Aldermen and Commonalty of New York

against

Robert W. Workman

No. 4

SUPPLEMENTAL BRIEF FOR THE LIBELLANT

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Advocates

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

The Mayor, Aldermen and Commonalty of the City of New York and James A. Gallagher,
Appellants,
vs.
Robert W. Workman,
Libellant-Appellee.
No. 4.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

SUPPLEMENTARY BRIEF FOR LIBELLANT ON REARGUMENT.

The exemptions of municipalities for the acts of their servants depend on the conflicting views of the common law courts in different States. In Massachusetts, where towns and cities had but limited and *quasi* corporate powers, generally the city is not responsible for the negligent acts of its officials. Other States extend the scope of corporate powers and give correspondingly greater remedies to an injured party.

THE SUPPOSED DANGER OF AN INDEFINITE AND RUINOUS LIABILITY FOR THE ACTS OF A FIRE DEPARTMENT.

The ground for excluding the neglects of firemen from the class of answerable and remediable torts by a city's servants is the fear of admitting a liability which may be capable of dangerous extension.

Once make a city pay for driving a hose-cart upon the sidewalk, and what follows? You open the door to suits for the inefficiency of the whole fire department, including all its ap-

paratus and equipment, and even the water supply. In case of a conflagration the city might thereby be bankrupt. It is such a possibility as this which has held back certain Courts from giving any recovery for the negligence of the employees of the fire department.

Although the Court of Appeals of the State of New York has never directly decided this precise point, its reasoning has frankly led in this direction. In Fire Ins. Co. *v.* Village of Keeseville, 148 N. Y., 46, 32, Judge Gray remarked:

"While the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this, might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged by fire insurance companies as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained."

The maritime liability of a vessel owner has no indefinite and ruinous obligation for damage. It is limited to the value of the owner's interest in the vessel, and her pending earnings. Thus the argument that has sometimes checked our common law courts from following the rule *Ubi jus ibi remedium* has no application to the case of a ship owner in admiralty.

Liability of a vessel owner recognized at common law, as well as in the Admiralty.

This liability of a vessel owner, regardless of the relation of master and servant, is not alone in the admiralty. It appears also in the English common law decisions.

In 1804 a collision occurred with a ship chartered to the Commissioners of the navy, who had put on board a naval com-

mander with a king's pilot who was at the time giving orders to the seamen. A suit was brought against the owners, who defended on the ground that they had surrendered all control of the vessel to the navy, and that they were not answerable for the neglects of those officials of the Government. It was argued for the plaintiff that *prima facie* the owners were answerable.

"It is incumbent on them to point out some other person who is liable if they are not so. The injury having been occasioned by there being too much cable on board the charge does not fall on any person individually but on the owners of the ship, on board of which there appears to have been an improper execution of a proper order owing to which the injury ensued. The soundest policy is to hold the owners liable in all cases in which their liability is not clearly removed."

For the defendants it was urged:

"It seems to be assumed that the owners of ships stand in a different situation from other persons who are owners of any other sort of personal property; and that they are liable not only for the acts of their own servants, but for the acts of the servants of those to whom they have for temporary purposes surrendered the control of the property."

Sir James Mansfield, in giving judgment, said:

"On the whole, it appears to the Court that this ship, notwithstanding it had an officer on board, is with regard to third persons to be considered as the ship of the owners; and that they are therefore answerable for damage done by their ship." Fletcher *v.* Braddick, 5 Bos. & Puller, 182, 187.

Other decisions holding the shipowner liable for the neglects of a government pilot are:

Yates *v.* Brown, 8 Pick., 23.
Bussey *v.* Donaldson, 4 Dallas, 204.
Williamson *v.* Price, 16 Martin (La.), 399.

The law of Belgium is specially connected with the decision of this Court in the *China* (7 Wallace, 53). The opinion quotes

with approval the judgment of Dr. Phillimore in the *Halley* (L. R., 2 A. & E., 3) in which the plea had been sustained, that by the Belgian law compulsory pilotage was no defense to the liability for collision.

The decree which settled this rule for Belgium (and was followed also in Holland) was rendered August 14th, 1846.

Having discussed the points raised by the defendant shipowner, and the official character of the pilot, the continental court pointed out that the resulting liability from the fact of ownership, without the relation of agency, was in analogy to other familiar legal principles.

"Qu'il existe en droit divers exemples de responsabilité encourue par les propriétaires d'une chose inanimée. (Art. 1386 Code Civil, 407, 417 et suivants du code de commerce); qu'il serait donc exorbitant de décharger de la responsabilité d'un abordage le propriétaire d'un navire, lorsqu'il le fait naviguer dans son intérêt, sous la conduite d'un pilote expert dont il accepte les services conformément aux lois et usages."—Jurisp. du Port d'Anvers, 1856, 1, 189.

That there exist in the law many instances of liability incurred by owners of an inanimate object (citing the civil and commercial codes).

That it would therefore be unreasonable to discharge the owner from the collision liability of a ship, which he allows to navigate in his interest, under charge of an expert pilot, whose services he accepts according to law and custom.

In 1858, a collision occurred near Marseilles between a Neapolitan brig, in charge of a pilot, and a French sailing vessel. On the defense of compulsory pilotage the French Court said:

"Attendu que le capitaine du brick napolitain se prévaut encore de la présence d'un pilote qui dirigeait son navire lors de l'abordage, pour en décliner la responsabilité;

Attendu qu'il ne s'agit point dans la cause de la responsa-

Whereas the master of the Neapolitan brig raises the further point of the presence of a pilot, who had directed his vessel at time of the collision, in order to free himself from liability;

Whereas the cause turns not

bilité personelle de ce capitaine, mais de sa responsabilité en nom qualifié, comme représentant l'armement;

Que cette responsabilité est indépendante de la considération de la personne qui conduisait le navire;"—Journal de Marseille, 1859, 1, 68, 69.

upon the personal responsibility of the master, but on his responsibility in his official designation, as representing the owners;

That this responsibility is independent of the consideration of the person who had charge of the vessel.

As was said recently by the Supreme Court of Massachusetts:

"The pilot is engaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible."

O'Brien *v.* Cunard Line, 154 Mass., 276, 277.

The learned District Judge, in the first part of his decision, states the principle:

"By the *maritime* law, both the vessel and the owner are ordinarily liable for such a marine tort." (Record, p. 77.)

As Lord Watson said:

"Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated, but it is, in the language of the maritime law, *attributed to the ship*, because the ship, in their negligent and unskilful hands, is the instrument that causes the damage." Currie *v.* McKnight, [1897] Appeal Cases, 97, 107.

This has been approved by this Court, and the doctrine explicitly stated:

"The foundation of the rule that a collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, *by whomsoever owned or navigated*, is considered as herself the wrongdoer, liable for the tort and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England."

The *J. G. Stevens*, 170 U. S., 113, 120.

UNIFORMITY ESSENTIAL IN THE ADMIRALTY.

While the owners should always be answerable for damage "by their ship," it is in the maritime courts that this principle is generally accepted. For that, among other reasons, the necessity for maritime courts administering one and the same system of law has been long recognized.

Thus Exton, Judge of the Court of Admiralty, in his treatise called The Maritime Dicæologie, or Sea Jurisdiction of England, wrote:

"I shall but once again put you in mind of what hath been already said concerning the necessity of upholding one and the same law in all nations in maritime causes, for one nation's rendring of the same justice to another that it doth from thence receive, which is the chiefest thing that maintaineth the community of traffic and commerce, which cannot possibly be done if the same should be rendred by the various fancies of men, in no wise guided by any certain form or rule but by that thing (than which nothing can be more uncertain) which men call opinion: *tot capita, tot sententiæ*" p. 223 (Ed. London, 1755).

Pardessus thus speaks of this harmony in the maritime law of different countries:

"Produites en tout pays par des besoins semblables, elles tiennent de cette circonstance même un caractère d'universalité qui permet de leur appliquer ce que Cicéron a si bien dit du droit naturel, *Non opinione, sed naturâ jus constituitur:* et comme elles intéressent l'univers, dans lequel les navigateurs forment, pour ainsi dire, une seule famille, leur esprit ne sauroit changer avec les démarcations territoriales: elles doivent être partout les mêmes, parce que partout leur prévoyance hospitalière doit offrir les mêmes garanties aux étrangers qu'aux nationaux.

"Le plus mauvais code civil seroit sans contredit celui qu'on destineroit à tous les peuples indistinctement; le plus mauvais code maritime, celui qui n'auroit été dicté que par l'intérêt spécial et l'influence particulière des mœurs d'un seul peuple." Collection de lois maritimes, chapitre préliminaire, tome 1, p. 3. Paris 1828.

It was to secure this uniformity in maritime law that the grant in our Constitution was made to the United States of all causes of admiralty and maritime jurisdiction. The experience of the differing State admiralty courts during the Confederation was then fresh in popular memory.

Penhallow *v.* Doane, 3 Dallas, 54.

Justice Story refers particularly to collisions and like causes in admiralty, and says of the clause giving the jurisdiction to the United States Courts:

"There is therefore a peculiar fitness in appropriating this class of cases to the national tribunals, since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication, and thus to become more satisfactory to foreigners."

Commentaries on the Constitution, §1670.

The necessity for this uniformity is recognized in all the steps to form the Constitution, from the first draft proposed by Pinckney to the completed instrument. It was a frequent remark of the fathers that to this unifying force in maritime matters we may be said to owe the continued existence of the Union itself.

"How easy it is to perceive that our harmony may be interrupted and our strength impaired, if each State may adopt and enforce on its half of a river—its section of a lake—its short stretch of coast—in its own ports and harbors and local waters—to which all the States have a common right of use—a system of commercial and maritime law repealing or conflicting with that great system of commercial law which is known as the Admiralty and Maritime law, and which alone can secure those equal State rights which it was the one great object of the Constitution to protect."

Benedict's Admiralty, §208.

Should the decision of the Circuit Court of Appeals stand, what becomes of this cherished Constitutional safeguard? The law of our ports and harbors will no more follow the federal

courts. The comprehensive wisdom of the Constitution, that this court should ordain and establish a law of admiralty, fixed, uniform and unchanging, will have failed. The Rules of the Road, legislation of congress, and even the solemn sentences of the federal tribunals will be unheeded by the steam vessels owned by the great municipalities. No more can it be said that this Court, in matters maritime, speaks *urbi et orbi!*

As the remedy would vary with the differing State laws, the suitor in effect would be remitted to the confusion and chaos that characterized the maritime tribunals erected by the States under the Articles of Confederation.

This danger has been guarded against in former decisions of the federal courts.

The *Lottawanna*, 21 Wall., 580.
The *J. E. Rumball*, 148 U. S., 1.
Moran *v.* Sturges, 154 U. S., 256.
Butler *v.* Boston S. Co., 130 U. S., 527, 556.

Thus the admiralty protects maritime liens which arise during the control of a State receivership.

The *Resolute*, 69 F. R., 742.

In the *Avon* (Brown's Ad. Reports, 170, 192) the principle is declared:

"The general rule in reference to ships, as we understand it, is not to yield the maritime law to any doubtful suggestions of the local power; and in no case to do so, where its invasions are unjust and injurious to the general interests of commerce."

See also the *Henrietta New*, Newb., 241.

The Circuit Court of Appeals has been led into a curious fallacy. The collision liability of a shipowner antedates all the technicalities of municipal departments. Its basis is real rather than personal. After having been taken as an axiom—quoted, too, in common law courts in support of the salutary rule that ownership of property carries with it liability—the

very courts that have builded on its logic are now asked to disregard this fundamental principle in favor of those municipal encroachments, against which this maxim has been an effective bulwark. For in Bailey *v.* The Mayor, 2 Denio, 433, 449, and in Barnes *v.* Columbia, 91 U. S., 540, 546, this collision liability for acts of a compulsory pilot was held the ground for holding a city liable, as owner, for acts of a Board of Commissioners appointed by compulsion of law. In face of this line of authority the Circuit Court of Appeals has denied this premise. It bases the admiralty liability of a shipowner for collision on the subversive technicalities that this Court has rejected even in regard to civic liability on the land!

Can steam vessels find immunity for collision by the easy device of State legislation, placing the title of ships away from the responsible management? Any decisions of a State court wrested from their true scope, so as to free a steam fire boat from collision, would become spoliatory diplomas, indeed judicial letters of marque, against the commerce of the port!

There is no reason for this deference to the State courts because this is a suit *in personam* and not *in rem*. Indeed, the suit *in rem* is the exception. The continental tribunals do not know it. The suit against the owner, or the master, as party defendant, is the ancient procedure, by which the liability of the vessel is worked out.

Even in a suit *in personam* against Spanish ship-owners, they were not allowed to defend by pleading the law of Spain, under which they were freed from liability.

The *Leon*, L. R., 6 P. D., 148.

THESE DIFFERING STATE SYSTEMS NOT STEADFAST.

The law of immunity for different subdivisions of the modern city rests on no sound principle, and is therefore subject to change more and more in the direction of placing large depart-

ments beyond the reach of suitors. How, then, can the federal courts follow such uncertain and shifting guides? In the attempt to do so the United States Circuit Court (Judge Wallace) in 1889 held the city liable in admiralty for torts of steam vessels engaged in the Department of Street Cleaning.

Barney Dumping Boat Co. *v.* The Mayor, 40 F. R., 50.

But his *ratio sententiæ* has since been taken away. The courts of common law in New York now hold that street cleaning is a matter of public health, and that the duties thereby undertaken by the city therefore are not corporate. Fortified by the decision in the case at bar (Mayor *v.* Workman, 67 F. R, 348), it is now held that one struck by an ash cart, in the employ of the street cleaning department, has no redress.

Bishop *v.* The Mayor, 21 Misc. (Delehanty) Rep., 598.

THE RULE IN GREAT BRITAIN.

In England, the tendency is against shielding public servants from liability for negligence. Thus local boards, public officers, and public corporations, charged with a statutory duty, must answer in damages to anyone injured by negligence in the performance of that duty.

Smith *v.* West Derby Local Board, 3 C. P. Div., 423.
White *v.* Hindley Local Board, L. R., 10 Q. B., 219.
Ohrby *v.* Ryde Commissioners, 5 B. & S., 743; 10 Jur. N. S., 1040.
Foreman *v.* Canterbury, L. R., 6 Q. B., 214.
Reney *v.* Magistrates of Kirkcudbright [1892], A. C. 264.

The corporation of the Trinity House—which performs governmental functions, like those of the Lighthouse and pilotage boards of other countries, and is charged also with buoying channels and wrecks—is not regarded as a servant of the Crown, so

as to be exempt from responding in damages for bad navigation of its vessels or neglect in regard to buoys.

Romney *v.* Trinity House, L. R., 5 Excheq., 204; 7 do, 247.

Gilbert *v.* Same, 17 Queen's Bench Div., 795.

The Metropolitan Board of Works are held liable for the negligence of the officers of a fire-brigade while engaged in extinguishing fires. Even in the extraordinary instance of the failure of such officers to restrain the firemen from feloniously taking wine from a London restaurant, during a fire, a judgment was sustained against the Board.

Joyce *v.* The Metropolitan Board of Works, 44 Law Times, 811 (1881).

THE ENLARGED POWERS OF MODERN MUNICIPALITIES.

The rapid extension of the powers of great cities—their entry into new industrial fields, where they supplant individual enterprises—show the dangerous scope of the immunities now claimed.

The modern municipality owns and directs water-works, street-railways, gas and electric lighting, sewers, parks, abattoirs, and markets.

On the water, it has tugs and scows for garbage disposal, stationary and floating docks, public bath and wash-houses, with schoolships for training in seamanship. A seaboard city may incidentally maintain a fleet of vessels for its police, charity, and harbor functions.

Ferries are now coming directly under city operation. That from Liverpool to Birkenhead, consisting of seven large steamers, is owned and run by the corporation of Birkenhead. The Trustees of the Clyde Navigation also carry on the ferries of Glasgow, as do the local Harbor Commissioners those of Belfast. The London County Council maintains and operates a free ferry over the Thames at Woolwich.

This tendency to confer new powers upon cities is supposed to make for economy, and improved service, with increased public welfare. But none of these ends can be rightly attained by the disregard of the obligations of ownership. With new functions must follow new responsibilities. To deny to the individual proper redress because the neglect, otherwise actionable, was on the part of a hydra-headed municipality is to oppose true urban development.

Whatever regretable *lacunæ* there may be in the system of the Courts of common law, there should be none in the admiralty. On the water no discrimination is made between the maritime instrumentalities of different departments having a common municipal ownership. In the ancient law of the sea all such boats are equal. Only armed vessels of the sovereign are beyond the Courts.

THE DRAWBRIDGE CASES.

By the common law, the liability of the municipal owner is uncertain and varying. In Massachusetts, the city is not liable. (French *v.* Boston, 129 Mass., 592; Butterfield *v.* Same, 148 do., 544.) On the contrary, in Illinois and Wisconsin the liability is settled (Scott *v.* Chicago, 1 Biss., 510; Weisenberg *v.* Town of Winneconne, 56 Wisc., 667; Stephani *v.* Manitowoc, 89 Wisc., 467). It is still more doubtful as to counties. Regarding bridges, it has been authoritatively stated that "the common law responsibility of counties has never prevailed in the United States." (Dillon, Municipal Corporations, 4th ed., §729 n.)

In striking contrast to this *vaga aut incerta lex,* is the established rule of the maritime law. A certain remedy is given in the admiralty, although it cannot proceed *in rem.* (The *Rock Island Bridge,* 6 Wall., 213.)

Vessels damaged by such bridges recover *in personam* against the muncipality.

Etheridge *v.* City of Philadelphia, 26 Fed. Rep., 43, Judge Butler.

Edgerton *v.* The Mayor, 27 Fed. Rep., 230, Judge Brown.

City of Boston *v.* Crowley, 38 F. R., 202, Judge Colt.

Manistee Co. *v.* City of Chicago, 44 F. R., 87, Judge Blodgett.

Hill *v.* Board of Freeholders, 45 F. R., 260, Judge Green.

Greenwood *v.* Town of Westport, 60 F. R., 560, Judge Townsend.

The principle of these decisions is well stated by Colt, J.:

"Nor can I agree to the proposition that in the federal courts the only remedy for wrongs of this character against *quasi* corporations such as cities, unless a right of action is conferred by statute, is by indictment. The contrary of this has long been established. Wrightman *v.* Washington, 1 Black, 39," and other cases.

See also Oregon *v.* Columbia S. Co., 53 F. R., 549.

Notwithstanding the above decision by Judge Townsend, the Supreme Court of the State of Connecticut afterwards held the city of New Haven free from liability in a common law action for damages to a child from alleged improper construction of a drawbridge. The Court make a distinction between the bridge closed and open. They refer to "the movable part of the bridge, when it has, *in aid of navigation,* temporarily ceased to be part of such highway," and they distinguish the United States decision in the Westport case, on the special facts, and upon the ground that its decision was "upon *principles of maritime law,* that have no application here."

Daly *v.* New Haven, 69 Conn., 649.

If the mere swing of a drawbridge in aid of navigation submits it to the maritime law, and takes it out of the rule of the State decisions, how much more should the equipment of a powerful steam fireboat and sending her to navigate in ports

and harbors take it out of the narrow rule that denies any remedy for a collision with a hose cart on land?

Since the first argument of this case the point has been decided in the port of Chicago. The learned opinion of Judge Grosscup is printed in the Appendix.

March, 1899.

HARRINGTON PUTNAM
CHARLES C. BURLINGHAM
Advocates for Libellant.

Appendix.

THOMPSON NAVIGATION CO. v. CITY OF CHICAGO.

79 Federal Reporter, 984.

(District Court, N. D. Illinois. April 5, 1897.)

COLLISION—LIABILITY OF CITY FOR NEGLIGENCE OF ITS FIRE TUG.

A city is liable in personam for a collision between its fire tug and another vessel, caused by the negligence of the tug. The Fidelity Fed. Cas. No. 4,758, 16 Blatchf., 569, disapproved.

In Admiralty. Libel by the Thompson Navigation Company against the City of Chicago.

John C. Richberg, for libellant.
William G. Beale and B. Boyden, for defendant.

GROSSCUP, District Judge. This is a libel in personam against the city of Chicago, growing out of a collision between the fire tug Yo Semite, owned by that city, and the propeller City of Berlin, owned by the libellant. The collision occurred in the Chicago river, near the point where it branches into its south and north forks. At the time of the collision, the City of Berlin was lying in winter quarters. The circumstances of the collision were such that had the tug been owned by private owners, and engaged in a private enterprise, there could be no doubt of her liability for the injury done. In saying this, I keep fully in view the fact that fire tugs are expected by the nature of their duties to make haste. The haste in this case was blind and thoughtless, resulting in a delay to the tug, as well as injury to the City of Berlin. Indeed, counsel for the city do not seriously contest the fact of negligence. But the fire tug was at the time of the collision owned by the city of Chicago and actually engaged in one of the public duties that Chicago, as a part of the government, undertakes. Do these facts, or either of them, exempt her, or the city, responding in her behalf, from what would otherwise be her clear liability?

At common law, one injured either in his property or person looks for compensation to the person or persons causing the injury, or to the master or principals of such persons, where the injury was done within the scope of their agency or service. In admiralty the rule is this: The vessel committing the unlawful

injury is considered the offender, and the owner is mulcted to the extent of his interest in the vessel; not because he stands in the relation of principal or master to the crew, but alone because of the fact of ownership. Thus, under laws preventive of piracy or smuggling, the vessel may be seized, condemned, and sold, notwithstanding the crew committing the unlawful acts were engaged by the owner for a lawful enterprise only, and were, in the commission of the unlawful acts, wholly outside the scope of their engagement. U. S. v. The Malek Adhel, 2 How., 209. Commenting upon this apparent anomaly of maritime jurisprudence, and showing that the doctrines advanced in the case then under consideration were not different from those prevailing generally in maritime law, Mr. Justice Story, at page 234, speaks as follows:

"The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

It is thus apparent that the liability of the owner, to the extent of his vessel, for injuries caused in a collision by negligence or misconduct, is not dependent upon the relation of master and servant, or principal and agent, existing between him and the crew manning the vessel, but rests solely upon the fact of ownership. The ship, which, in contemplation of maritime law, is not the hulk and machinery only, but includes the crew as well, is, as such, the offender, and the ensuing losses reach the owner simply because of his relationship to the offender. In Rome, it is said that, when the owner of slaves was assassinated, every slave belonging to him, however otherwise innocent, was put to death. The penalty came not as the result of participation, but as the result of relationship. The maritime law, for justifiable public purposes, inverts this mandate, putting every owner, by virtue of such relation, to the duty of compensation for losses inflicted by his ship property, to the extent, at least, of the value of such property. Nor is this liability of the owner indirect alone, for the admiralty rules of the supreme court provide (rule 15) "that, in all suits for damage by collision, the libelant may proceed against either the ship and master, or against the owner alone in personam." The method of procedure chosen does not

change the substantive right or liability. In either case the ship is the offender. If the procedure be against the ship alone, resulting in seizure and sale, the owner is only indirectly reached; but, if it be against the owner in personam, the remedy against him is direct. The substantive right is compensation for the injury, and can be either by way of the ship or from the owner directly.

A firm grasp of this principle of maritime law clears this case of its difficulties. At common law the city is not liable for the negligent acts of its fire department, for the reason that the members of the fire department are not the servants of the city in its corporate capacity. The negligence of the firemen, therefore, is not attributable to the city. But in the case under consideration the injury done by the vessel, including its crew, to the libelant, is chargeable to the owner, by virtue of the mere fact of ownership, and can be collected, directly, by seizure of the vessel, or, indirectly, by a suit in personam. In either case the liability rests, not in the relation of principal and agent, or master and servant, but in the bare fact of ownership.

But, though such liability exists, reasons of public policy may, in some cases, exempt the owner from suit. The government, as sovereign, for instance, declines to be made compulsorily amenable to the courts upon even just obligations. This exemption, however, is founded entirely in public policy (The Siren, 7 Wall., 152), and ought not to be extended to cases where such considerations do not intervene. In England, I think, they do better. In claims arising against public vessels, the apparently conflicting right of the sovereign to exemption from suit, and her duty to respond to just claims, are both maintained by a procedure, effective, though somewhat fictitious. A petition of right is addressed by the aggrieved person to the lords in admiralty, representing the crown, who, in turn, direct their proctor to appear and answer a suit to be commenced in the admiralty court. This is equivalent to a waiver by the crown of its privilege as a sovereign, and to a consent that the rights of the parties be tried and determined in the suit as between subject and subject. There appears, however, to be no way of making the government of the United States, or of a state, parties to such a proceeding, because no procedure has been invented here whereby the right of immunity from the suit is waived. But the city of Chicago is, by law, amenable to suit and judgment upon all just claims that may be brought against it. The doctrine of public policy, therefore, under which this exemption is accorded

to sovereigns, stops short of city government. The law by making such cities suable abolishes the doctrine in what might otherwise be its application to city governments. The legislative will has, in effect, decreed that there is no public policy excepting cities from suit. The city is suable, and may be decreed to pay as a private owner where a case is proved. This clearly differentiates this case from the The Siren, supra.

One other consideration alone remains: I have held, on the strength of The Fidelity, 16 Blatchf., 569, Fed. Cas. No. 4,758, decided by Chief Justice Waite on the circuit, that an action in rem cannot lie against this fire boat. Will that prevent a decree in personam against its owner? The difference between mere procedure and substantive right must be steadily borne in mind. The latter alone determines the right of some judgment or redress. The former only fixes the method of reaching it. A seizure of the vessel is only a species of execution in advance of judgment. It is usually permissible in admiralty, because, under ordinary circumstances, most effective and equitable. But public policy prevents its application to such instrumentalities as a fire tug. A city cannot be left to burn while a contest over a few dollars of damage is going on. The law, therefore, out of considerations of public policy, forbids such seizure, or any process that would disarm the city, even temporarily, of its equipment to put down fires or like dangers. But exemption of the owner of the boat from one of the ordinary processes of the court is not, either in logic or law, a grant of immunity against liability, through some other procedure, not subject to such objections. The consideration of public policy extends only to the mischief to be averted. To give it a wider application would make it an instrument of injustice. An apt illustration of this limitation on procedure only is seen in the law which exempts cities, in the common-law court, from seizure of their property upon execution. But it has never been urged that, because of that, they were not suable at all, or that judgments entered against them were in no way enforceable.

My conclusion is that the city of Chicago, as owner, at the time of the collision, of the fire boat, is responsible to the libelant in an action in personam to the extent of the value of such fire boat for the injuries caused. I recognize that in this conclusion I depart from the case of the Fidelity, supra, but believe myself to be in consonance with the doctrine laid down in The Siren, supra, and The Malek Adhel, supra. A decree may be entered accordingly.